No. 15032

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

United States of America,

Appellant,

vs.

Wayne A. Parkinson, an individual Trading and Doing Business as Glandular Products Company and Dybutol Company, and Allen H. Parkinson, an Individual Trading and Doing Business as Tide Mailing Service, and Margaret M. Willis,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division

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APPELLANT'S BRIEF

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES PAGE

HEARINGS AND REPORTS PAGE

STATUTES

TEXTBOOKS

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APPELLANT'S BRIEF

I.

STATEMENT OF JURISDICTION

Under 21 U.S.C. 332(a), the District Court had jurisdiction to entertain the complaint for a statutory injunction filed in this case, and to restrain the defendants from further violations of the Federal Food, Drug, and Cosmetic Act. While the District Court did issue a permanent injunction as prayed, it denied that it had the power to order the defendants to tender restitution of the purchase price, as prayed for in the complaint, to those persons whom the defendants had induced to buy misbranded drugs. This was a final decision.

Under 28 U.S.C. 1291, this Court has jurisdiction to review the decision of the District Court to determine whether that Court does have power to order restitution in an injunction suit brought under 21 U.S.C. 332(a).

II.
STATEMENT OF FACTS

A. Summary of Proceedings

A Complaint for Injunction was filed in the District Court on February 26, 1954, under the Federal Food, Drug, and Cosmetic Act to restrain the defendants from continued violations of that Act through the marketing of certain nostrums for sex rejuvenation. [R. 3-17]. The Complaint also asked that the Court order the defendants to restore the *status quo* by tendering restitution of the purchase price to those who had been induced to buy such nostrums. [R. 17].

On February 26, 1954, the District Court issued a Temporary Restraining Order without notice, which effectively halted defendants' nationwide distribution scheme for worthless sex-rejuvenator drugs. [R. 34-36].

On March 5, 1954, the District Court held a hearing on an Order to Show Cause why a preliminary injunction should not issue. [R. 36-37]. At the conclusion of that hearing, the District Court ruled that a preliminary injunction should issue in compliance with the local rules of the Court. On the same date, the District Court issued an Order Extending Temporary Restraining Order. [R. 43].

On March 11, 1954, the District Court filed Preliminary Findings of Fact and Conclusions of Law [R. 44-56] and an Order Granting and Decree of Preliminary Injunction. [R. 57-60].

On May 4, 1954, defendants filed a Notice of Appeal from the Order Granting and Decree of Preliminary Injunction. [R. 60-61]. On July 26, 1954, this appeal was dismissed on stipulation of the parties. [R. 61-62].

On November 5, 1954, the District Court approved and filed two documents—a Final Consent Judgment as to Per-

manent Injunction Only [R. 62-70] and a Stipulation and Order Re Issue of Restitution [R. 71-73]. The Consent Judgment permanently restrained defendants from the interstate distribution of drugs for sex rejuvenation. The Stipulation and Order described the restitution issue remaining before the Court and specified the mechanics for presenting and arguing that issue. It was also agreed that for the purposes of deciding the issue whether the District Court has discretionary power to order restitution in this action, all of the allegations of the Complaint for Injunction, as well as the contents of and Exhibits attached to the affidavits filed on behalf of the plaintiff, are true. [R. 71-72].

On July 25, 1955, argument was heard "on the question of whether the Court has jurisdiction in its discretion to require restitution, leaving for another time the further separate trial and determination of whether such restitution should be granted, if the Court determines . . . that it has such jurisdiction." [R. 73].

On October 21, 1955, the District Court handed down its opinion holding that it does not have the power to order restitution in a statutory injunction proceeding under the Federal Food, Drug, and Cosmetic Act. [R. 74-85; this opinion is also reported as *United States v. Parkinson,* 135 F. Supp. 208 (S. D. Calif., 1955)].

On November 15, 1955, the District Court filed a Final Judgment Denying Plaintiff's Prayer for Restitution which was docketed and entered on November 16, 1955. [R. 85-86].

On January 12, 1956, the United States, plaintiff below, filed a Notice of Appeal to this Court from the Final Judgment Denying Plaintiff's Prayer for Restitution. [R. 87].

B. The Factual Background of the Government's Prayer for Restitution.

For the six-year period 1948-1954, one or the other or both of the Parkinson brothers who are defendants—appellees in this suit were engaged in almost continuous violation of the Federal Food, Drug, and Cosmetic Act.

In exploiting the public through the sale of misbranded drugs, the Parkinsons developed a substantial mail-order business principally in the field of drugs offered as sex-rejuvenators. They have displayed considerable ingenuity in devising sales promotion techniques to stimulate purchaser demand for their newer drugs, as the hapless persons on their mailing lists lost interest in their older ones.

Early in 1948, Allen H. Parkinson, then trading as Hudson Products Company, embarked upon a widespread mail-order promotion of male and female sex hormones, representing that those drugs had remarkable powers of sexual rejuvenation. The hormones involved included methyl testosterone tablets and alpha-estradiol tablets. A four-count criminal information based upon that promotion was filed in the U. S. District Court for the Southern District of California and, on July 13, 1949, Allen H. Parkinson was convicted on all counts.[1] In announcing judgment of conviction, the District Court stated it was

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[1]See Drugs and Devices Notice of Judgment No. 2931. Such Notices of Judgment summarizing enforcement proceedings under the Federal Food, Drug, and Cosmetic Act are published pursuant to 21 U. S. C. 375(a) and are judicially noted. See *Colgrove et al. v. United States,* 176 F. 2d 614, 615 footnote 1 (C. A. 9, 1949), cert. den. 338 U. S. 911; *Libby, McNeill & Libby v. United States,* 148 F. 2d 71, 73 footnote 3 (C. A. 2, 1945). Moreover, the factual background described in this part of the brief is recited in the Complaint for Injunction. [R. 5-7.] By stipulation, all of the allegations of the Complaint and its supporting affidavits are deemed true for the purposes of determining the issue now before the Court. [R. 71-72.]

convinced beyond a reasonable doubt that these hormone preparations constituted not merely a potential danger but also an actual danger to health when used indiscriminately by the lay person.[2] The District Court also stated that the therapeutic claims which Allen H. Parkinson had made for these products far exceeded the benefits that could be derived from them. [R. 6].

But within a month after that conviction, Allen H. Parkinson, then doing business through the Hudson Products Company, a corporation, and its wholly owned subsidiary, Maywood Pharmacal Company, a fictitious name, again launched a nationwide mail-order promotion of drugs containing methyl testosterone. While the composition and labeling of the drugs were modified, Parkinson continued to make substantially the same sexual rejuvenation claims as were the basis of the criminal action. The United States filed a Complaint for Injunction in the U. S. District Court for the Southern District of California alleging that these activities violated the Federal Food, Drug, and Cosmetic Act. The District Court at first refused to issue an injunction but this Court reversed. *United States v. El-O-Pathic Pharmacy, et. al.,* 192 F. 2d 62 (C.A. 9, 1951). [R. 6-7].

In the *El-O-Pathic* opinion, this Court made a careful appraisal of the medical evidence and took the defendants to task for their reckless and indiscriminate distribution of dangerous drugs without heed to the judicial admonition enunciated in the criminal case at the time of conviction. We quote some of the forceful language used by the

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[2]The record of that case and the District Court's views on conviction were fully considered and discussed by this Court in a related case in which the same Allen H. Parkinson was a defendant. (*United States v. El-O-Pathic Pharmacy, et al.,* 192 F. 2d 62, 66, 76 (C. A. 9, 1951).)

Court of Appeals because it indicates Allen H. Parkinson's disregard for his fundamental responsibilities to the public as a distributor of drugs:

Pages 76-77

"The district court in the criminal cases, had found that the indiscriminate distribution or dispensation of testosterone carried not only a potential but an actual danger of injury, and that, outside a restricted class of cases, the drugs produced none of the benefits which appellees encouraged the readers to believe they would produce. If appellees accept this finding, as they claim to do, then, *for what purpose are they now distributing this dangerous drug in such an indiscriminate way and in such huge quantities?* It is plain they are selling it for uses other than set forth in the directions in the labels. Twenty-five million match cover advertisements for distribution in California alone is hardly assurance that appellees are limiting the sales of these dangerous drugs to such restricted legitimate use as was mentioned by the district court in its findings in the criminal cases, or established by the evidence in this case." [Emphasis added.]

Pages 77-78

"In the submission of their arguments, appellees leave the crucial questions in the case unanswered. If it is dangerous to take a drug except under a physician's supervision, and if the distributors of such a drug do not want persons to take it except under a physician's supervision, what objection do they have to selling it only upon the prescription of a physician? And if they do not want persons to take it except under a physician's supervision, *why do they exploit and promote such a drug, so restricted in its usefulness, by indiscriminate, widespread appeal directly to the public, offering customers sales in bargain lots*

when, as a result of such methods, it is most unlikely that physicians will be consulted by such customers? The failure and inability to give any adequate answers to these questions have transcendent significance." [Emphasis added.]

The pointed observations of this Court, implemented by the injunction subsequently issued by the District Court, did not convince Allen H. Parkinson that he should abandon further exploitation of sex rejuvenation drugs; they simply impressed him with the desirability of substituting an innocuous drug for methyl testosterone.

Commencing the latter part of 1952 and until halted by a temporary restraining order issued in this case in February of 1954, the Parkinson brothers initiated a series of mail-order promotions involving essentially inert drugs flamboyantly promoted for sexual rejuvenation. [R. 7-15; note also Exhibits 1-19 attached to the Complaint for Injunction].[3] In the order of their appearance on the market these drugs were "Vita-Glan Male Formula," "Bio-Glan Male Formula" and "Adler's Compound," and they are the foundation of the present suit. Typical of all the drugs but even more extravagant than the others was the latest, the "Adler's Compound" promotion.

The drug which defendants-appellees designated "Adler's Compound" consisted of tablets manufactured for them in Los Angeles in large quantities—200,000 at a time. [R. 19]. A bottle of 60 of these tablets, which defendants sold for $10, cost approximately twenty-five cents wholesale. [R. 19]. Defendants sold this drug in two "strengths"

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[3]By Stipulation, these Exhibits were not printed because of their length and character but they are part of the record on appeal and may be considered in their original form. [R. 91-92.]

—Standard Strength and Super Strength. [See labels, Exhibit 6 attached to Complaint for Injunction]. The same tablets supplied both "strengths," the only difference being that the Super Strength product was recommended in twice the daily dosage of the Standard Strength. [R. 11; Exhibit 6 attached to Complaint for Injunction].

The prosaic composition [R. 11] and local origin of "Adler's Compound" might have discouraged less resourceful entrepeneurs from thinking that with this product they could overcome the sales resistance of persons on their mailing lists who had already been subjected by the defendants to so many prior exploitations in the sexual rejuvenation field. [R. 5]. True, "Adler's Compound" contained "a base or inert testicular powders, prostate substance, glandular tissues and other excipients." [Exhibit 6 attached to Complaint for Injunction]. But this angle, preying on ignorance and superstition, had already been thoroughly explored in the earlier "Vita-Glan" and "Bio-Glan" promotions where the Parkinsons had proclaimed in bold type [Exhibits 16 and 10 attached to Complaint for Injunction]:

"Contains Most Effective Vitamins in Base of
4 Gland Substances

* * * * * * * * *

Vita-Glan Male Formula
is compounded of . . .
Gland Substances
Orchic Substances
The gland substance of whole bull
testicles vacuum dried."

* * * * * * * * *

and had added less conspicuously:

> "The base gland substances are inert and perfectly safe to use and are considered by many doctors to have great psychosomatic value in male sexual weakness of non-systemic, non-organic origin."

For "Adler's Compound," a different approach, a foreign flavor, was needed. With a touch of the Parkinson wand, this lowly product of Los Angeles was transformed to "a new and amazing medical miracle" "from out of post-war Germany" which would enable the purchaser "to be a man among men and to satisfy and thrill the woman of of his choice, to live again the joys that only a complete sex life can bring." [Exhibit 2 attached to Complaint for Injunction]. A German pharmaceutical manufacturer, Konrad Adler & Company, was created out of whole cloth complete with German address, German bank reference, European Sales Offices in Paris and Rome and London, and with a "licensed distributor" in the United States, which happened to be Glandular Products Company at Long Beach, one of the fictitious names under which the Parkinson brothers operated. [Exhibit 2 attached to Complaint.]

Since a photograph of the non-existent Konrad Adler would have persuasive sales value, that too was supplied through a distinguished-looking picture which had been posed in 1941 by a professional Hollywood model, one James Carlisle. [Compare photograph, R. 32, attached to affidavit of Dick Whittington, R. 30-31, with photograph on Exhibits 3, 4, and 6 attached to Complaint; see also R. 11].

The promotional literature was prepared in Los Angeles using Gothic type to simulate German print, together with a slogan in German and a coat of arms. [R. 19; Exhibits

2-6 attached to Complaint]. In addition, 150,000 mailing envelopes and 150,000 airmail business reply envelopes were printed in Los Angeles. [R. 19; Exhibits 1 and 5 attached to Complaint]. All of this material was shipped from Los Angeles to London where the envelopes were postmarked "London," the British stamps were cancelled, and the promotional material was sent to potential customers in the United States whose names were on mailing lists maintained by the Parkinsons. [R. 19, 5, 9; Exhibits 1-5 attached to Complaint.] "Adler's Compound" was offered with a guarantee of satisfaction in 24 hours or your money back[4] [Exhibits 2 and 4 attached to Complaint.]

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[4]The money-back guarantee, though it has its legitimate uses, is also a common phenomenon in the sales promotion of quack remedies. See *Bradley v. United States,* 264 Fed. 79, 80 (C. A. 5, 1920); *United States v. 50¾ Dozen Bottles . . . Sulfa-Seb,* 54 F. Supp. 759, 761 (W. D. Mo., 1944). The guarantee furthers the fraudulent scheme by inspiring confidence and increasing sales. In *Harris v. Rosenberger,* 145 Fed. 449 (C. A. 8, 1906), cert. den. 203 U. S. 591, defendants marketed "new whiskey" under a money-back guaranty as whiskey 9-14 years old. In upholding a postal fraud order, the Court said at page 455:

> "The falsity of the representations and the appellee's knowledge of their falsity being established, as they were, it was not an inadmissible view that *the promise to refund the purchase price, if the goods were not satisfactory and were returned, was cleverly devised to give apparent color and support to the representations.* True, it appeared that, in a few exceptional instances where customers discovered and resented the deceit which was practiced upon them, the appellee refunded the purchase price in fulfillment of his promise, but it cannot be said that this necessarily or conclusively disproved any intent to defraud, particularly when it was not questioned that in all other instances he retained the money obtained by means of the deceit which he was practicing. [Emphasis added.]

See also:

United States v. Sylvanus, 192 F. 2d 96, 105 (C. A. 7, 1951), cert. den. 342 U. S. 943;

[Footnote continued on page 11]

In response to this mail-order solicitation, defendants received and filled hundreds of orders per week for "Adler's Compound" ranging in amount from $10 for the one-month treatment of "Standard Strength" to $35 for the three-month treatment of "Super Strength"—until stopped by the District Court's Temporary Restraining Order. [R. 19-20, 34-36; Exhibit 4 attached to Complaint].

As is conceded in this appeal, "Adler's Compound," like its predecessors "Bio-Glan Male Formula" and "Vita-Glan Male Formula" had no value in the treatment of male sexual weakness or impotence. [Note also R. 20-23 (affidavit of pharmacologist); 24-26 (affidavit of urologist); R. 26-29 (affidavit of psychiatrist)]. All of these drugs were misbranded in numerous respects in violation of 21

[Footnote 4, continued from page 10]

Farley v. Heininger, 105 F. 2d 79, 84 (Apps. D. C., 1939), cert. den. 308 U. S. 587;

Cf. Jeffries v. Olsen, 121 F. Supp. 463, 473 (S. D. Cal., 1954).

Though apparently evidence of good faith, the money-back guarantee is in reality an integral part of the deception in a promotion such as "Adler's Compound". Since the drug is admittedly ineffective, defendants could not have hoped to profit except for the well-recognized propensity of most retail purchasers to refrain from acting upon the guarantee and seeking a refund. Moreover, defendants could count on especially few requests for refund here where there is a psychological barrier to such a request, implicit as it would be with the admission of impotence not overcome.

The validity of the "guarantee" of "Adler's Compound" is not an issue here but, in passing, we call attention to some of its mirage-like features. [See Exhibit 4 attached to the Complaint.] *Who is the guarantor?* The non-existent Konrad Adler? James Carlisle, the Hollywood model, who in 1941 had posed before a professional photographer for the photograph which was reproduced in Exhibit 4, who beyond question had never heard of "Adler's Compound", and who in fact died on February 3, 1954? [R. 30-33.] Glandular Products Company, which was not a legal entity but merely a fictitious business name acting under a "licensed arrangement" with the non-existent Konrad Adler & Company? [R. 7.]

U.S.C. 352(a), as specified in paragraphs (15), (17), and 19 of the Complaint.[5] [R. 10-14].

This, in brief, is the factual setting out of which the present action arose. Manifestly, the defendants had engaged in deliberate, systematic, and long continued violations of the Federal Food, Drug, and Cosmetic Act. Prior enforcement actions had simply inspired the defendants to greater ingenuity in frustrating the purposes of the Act.

For these reasons, the Government was impelled to file a Complaint for Injunction in this case seeking both a statutory injunction and an order of restitution—the injunction, to halt further violations; and the order of restitution, to restore the *status quo* by returning to the purchasers the funds of which they had been defrauded, thereby making enforcement of the statute meaningful to the defendants and to the public. Restitution would prevent unjust enrichment and, insofar as possible, would put the defendants and their defrauded customers in the position they would have occupied had there been no violation of the Act.

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[5]The perennial dream of a fountain of youth and the readiness of the unscrupulous to exploit that dream have long been responsible for promotions of remedies to regain "lost manhood". For a thoughtful discussion of this problem arising out of the vending of "Organo tablets" and "Vitality pills" in a setting similar to that now before this Court, see *Leach v. Carlisle,* 267 Fed. 61 (C. A. 7, 1920), aff'd 258 U. S. 138 (1922); *Missouri Drug Co. v. Wyman,* 129 Fed. 623 (C. C. E. D., Mo., 1904).

III.
QUESTION PRESENTED

Does the District Court have discretionary power, ancillary to its jurisdiction to grant injunctive relief under 21 U.S.C. 332(a), to compel a defendant who has sold drugs in violation of the Federal Food, Drug, and Cosmetic Act, to tender a refund of the purchase money to customers who have bought those drugs?

IV.
PERTINENT STATUTORY PROVISIONS

21 U.S.C. 332. Injunction Proceedings—

(a) *Jurisdiction of Courts*—

The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown, and subject to the provisions of section 381 (relating to notice to opposite party) of Title 28, as amended, to restrain violations of section 331 of this title, except paragraphs (e), (f) and (h)-(j) of said section.

(b) *Violation of injunction*

In case of violation of an injunction or restraining order issued under this section, which also constitutes a violation of this chapter, trial shall be by the court, or, upon demand of the accused, by a jury. Such trial shall be conducted in accordance with the practice and procedure applicable in the case of proceedings subject to the provisions of section 387 of Title 28.

21 U.S.C. 331. Prohibited acts

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

21 U.S.C. 352. Misbranded drugs and devices

A drug or device shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

V.
SUMMARY OF ARGUMENT

A. The Equitable Power of the District Court.

A statutory injunction proceeding is an equitable proceeding, regardless of whether the statute uses the term "equity."

A district court which is vested with power to issue a statutory injunction may exercise all of the powers of a court of equity unless there is a clear legislative restriction.

A statutory injunction suit under the Federal Food, Drug, and Cosmetic Act is a suit in equity and calls for the exercise of powers which are peculiarly those of a court of equity. This is confirmed by court decisions and the legislative history of the statute.

The equity jurisdiction of a federal district court encompasses a tremendous inherent power to see that justice is done in any equity case which is properly before the court. An equity court is not bound by the strict rules of common law but can mold its decrees to do justice amid all the vicissitudes and intricacies of life.

Restitution has long been one of the most potent remedies utilized by a Court of Chancery. Decisions in a number of significant cases have recognized the principle that issuance of a restitution order for the benefit of private persons is within the discretion of the District Court in statutory injunction suits brought by the Government.

B. The Rent and Price Control Cases.

These cases establish the principle that a statutory injunction suit to restrain the doing of prohibited acts is an equitable proceeding in which the district court may also order restitution unless the statute declares otherwise. Such inherent power may be exercised by that court, whether or not there is legislative affirmation of the power, as long as there is no legislative prohibition.

This Court has recognized that an order of restitution may be considered an equitable adjunct to a statutory injunction under the inherent equity powers of the court, and that nothing is more clearly a part of equity than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunction relief. "Such is the very essence of justice."

C. The Fair Labor Standards Cases.

The Fair Labor Standards Act and the Federal Food, Drug, and Cosmetic Act were enacted on the same day with almost identical statutory provisions for injunctive relief.

A series of cases under the Fair Labor Standards Act have ruled that restitution of back pay could be ordered as an adjunct to a statutory injunction which required the rehiring of a discharged employee.

One troublesome aspect of these cases was the existence of a statutory proceeding whereby employees could sue for back pay in their own right. An order or restitution in an injunction suit brought by the Government would not necessarily preclude a private suit by the employee, thereby subjecting the employer to the possibility of having to make good the back pay twice.

Congress then amended the Fair Labor Standards Act to set up two express statutory procedures for the collection of back pay: one to be brought by the Administrator on behalf of the employee, and the other to be brought by the employee himself. These procedures are mutually exclusive and preclude double litigation for the same back pay. Congress also provided that restitution should not be granted in an injunction suit, but only through the other procedures.

Restitution under that Act was thereby removed from the realm of equitable discretion and given status as an action at law where judgment for back pay is mandatory if a proper showing is made. Congress did not reject the principle of restitution but rather, with some qualifications, embraced it and made it an instrument of national policy.

D. The Anti-Trust Cases.

Injunction suits to restrain violations of the Sherman Act have sustained the remedy of divestiture which is analogous to that of restitution. Both remedies merely deprive a defendant of the gains from his wrongful conduct. Neither remedy is a penalty.

E. Restitution as A Remedy Under the Injunction Provisions of the Federal Food, Drug, and Cosmetic Act.

Restitution is available as a remedy in an injunction suit under the Federal Food, Drug, and Cosmetic Act.

It is proper for a court in an equity proceeding to restrain the doing of a prohibited act and further to command or enjoin the doing of other acts to assure compliance with the law or in any other way to accomplish justice in the particular case.

The Federal Food, Drug, and Cosmetic Act is remedial and should be liberally construed to carry out its beneficent purposes. The legislative history of the Act reveals Congressional concern over abuses of the consumer's health and pocketbook resulting from the sale of nostrums. The law was designed to safeguard the consumer from pecuniary loss as well as from bodily harm.

The traditional equity power to order restitution may be exerted in suits under 21 U.S.C. 332(a) since the statute contains (1) no prohibition against restitution, (2) a recognition that the District Court may include provisions in an injunction decree other than the restraint of a prohibited act, and (3) no exclusive statutory procedure for the return of the purchase price to defrauded customers.

A judicial declaration that a District Court has the discretionary power to order restitution as an equitable adjunct to an injunction suit under 21 U.S.C. 332(a) would most effectively further the salutary aims of the law. It would serve as a powerful deterrent to statutory violations by removing the probability of retaining the profits of the illegal promotion and it would also vindicate private rights which at present are largely beyond self-protection.

VI.
ARGUMENT

A. The Equitable Power of the District Court

The present case is based upon Section 302(a) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 332(a)] which authorizes the district courts to restrain certain violations of 21 U.S.C. 331. This being a statutory injunction proceeding, it might be assumed that it falls within the equity jurisdiction of the district court. But a fundamental premise in the trial court's decision appears to be that this proceeding is not in equity.

The lower court cites the injunction provisions of the Sherman Act where the district attorneys are authorized "to institute proceedings *in equity* to prevent and restrain such violations." [R. 81.] Such language, the lower court observed, "clearly empowers the district court with all the remedies of equity." [R. 81.] Since the injunction provision of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 332(a)] does not mention the word "equity," the trial court concluded that a suit under this provision does not empower the district court with all the remedies of equity [R. 76]:

> "We start with the axiomatic premise that the district court is one of limited jurisdiction, and has only the power and the jurisdiction spelled out in the statutory enactments of Congress. We exclude from consideration the general equity power of the court called into play in a diversity suit, and *also exclude those situations in which, by statute, the Congress has expressly provided that the court may exercise all the powers of a court of equity.*" [Emphasis added.]

But "a suit for an injunction is an equitable proceeding." *Wilson v. Shaw,* 204 U. S. 24, 31 (1907); Story, *Com-*

mentaries on Equity Jurisprudence (14th Ed., 1918), Vol. 2, §1184, p. 553.

Nor do the courts draw a distinction between statutory and non-statutory injunction suits, or between statutes which use the term "equity" and those which do not. The statutory provision for injunctive relief under the Fair Labor Standards Act says nothing of equity [29 U.S.C. 217], but suits thereunder have been consistently treated as within the full "equitable cognizance of the court." *Mitchell v. Chambers Construction Co.,* 214 F. 2d 515, 517 C. A. 10, 1954); *Tobin v. Abelson,* 103 F. Supp. 404 (E. D. Tenn., 1951); *Tobin v. Pirchesky,* 101 F. Supp. 484, 485 (W. D. Penn, 1951); *McComb v. Frank Scerbo & Sons,* 177 F. 2d 137, 138-139 (C. A. 2, 1949); *Walling v. O'Grady,* 146 F. 2d 422, 423 (C. A. 2, 1949).

Similarly, the provision for injunctive relief under the Emergency Price Control Act said nothing of equity but this did not preclude exercise of the traditional flexible historic power of the Chancellor to do equity. *Hecht Co. v. Bowles,* 321 U. S. 321, 329-330 (1944); *Porter v. Warner Holding Co.,* 328 U .S. 395, 397-398 (1946); *Porter v. Lux,* 157 F. 2d 756, 757 (C. A. 9, 1946). When a court's equity jurisdiction is invoked, it may utilize all of its equity powers unless there is a clear legislative restriction. Thus, in the *Warner Holding* case, the Supreme Court stated, 328 U. S. at page 398:

> "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."

While the Federal Rules of Civil Procedure abolished all distinctions as to forms in the federal courts between

actions at law and suits in equity, "the difference in substance in federal judicial power between law and equity is embedded in the Constitution and remains unaltered." *Commercial National Bank in Shreveport v. Parsons,* 144 F. 2d 231, 240-241 (C. A. 5, 1944), cert. den. 323 U. S. 796; U. S. Constitution, Art III, Sections 1 and 2. See also *Stainback v. Mo Hock Ke Lok Po,* 336 U. S. 368, 382 footnote 26 (1949).

A case arising under a federal law authorizing a representative suit to enforce liability of shareholders of a Bank, "concerns not only a federally-created right but a federal right for which the sole remedy is in equity," *Holmberg v. Armbrecht,* 327 U. S. 392, 395 (1946), because it "requires the exercise of powers which are peculiarly those of a court of equity." *Russell v. Todd,* 309 U. S. 280, 285 (1940). And in the *Holmberg* case, the Court added at page 395:

> "We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights."

The Supreme Court agreed to review the *Holmberg* case because it raised "a question of considerable importance in enforcing liability under *federal equitable enactments*" [327 U. S. at page 394], but the statute in that case did not use the term "equity" or "equitable." [327 U. S. at page 393, footnote 1.]

A statutory injunction suit under the Federal Food, Drug, and Cosmetic Act, we submit, is also a "remedy in

equity" since it too calls for the exercise of powers which are peculiarly those of a court of equity. Thus where a district court issued an injunction under this statute restraining a defendant from shipping any cheese in interstate commerce for a period of two years *with a right to seek modification of the injunction after the two years had elapsed* on a showing that it was then no longer using filthy milk to make its cheese, the Court of Appeals reversed, *Hygrade Food Products Corp. v. United States,* 160 F. 2d 816 (C. A. 8, 1947), saying at page 819:

> "The injunctional decree should be an ambulatory one. It is executory and continuing as to its purpose and should be subject to adaptation as events may change . . . *The denial of the right to apply to the court for a modification of the judgment within a period of two years is contrary to the genius of the jurisprudence of chancery."* [Emphasis added.]

In another case [6] under this statute, the trial court denied a motion for a preliminary injunction, observing:

> "The granting of an injunction is discretionary and not mandatory in the case of clear violations of the law, even in cases involving the public interest brought under statutory authority. The Hecht Co. v. Bowles, supra. While it might be more imperative to issue an injunction in public interest where the statute directs, *yet the equities are somewhat the same as in ordinary injunction actions,* as is recognized in the case last cited." [Emphasis added.]

The legislative history of this injunction provision confirms the view that it was intended thereby to invoke the broad

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[6] *United States v. Chattanooga Bakery, Inc.* (E. D. Tenn., 1949), reported in Kleinfeld and Dunn, *Federal Food, Drug, and Cosmetic Act—Judicial and Administrative Record 1949-1950* (Commerce Clearing House, 1951) page 241, 243-244.

equitable powers of the court. Thus, in a colloquy[7] between Senator Austin and Senator Copeland, the following was said:

> "Mr. Austin. Is it not the understanding of the Senator from New York that *this remedy is an equitable one* and can be brought against a specified defendant and all other persons similarly situated, so that the scope of the injunction may be such as to afford a basis for contempt proceedings anywhere in the United States and be good against any person falling within the proscribed class of defendants?
>
> Mr. Copeland. *Yes.*" [Emphasis added.]

In the same vein, Mr. Campbell, then Chief of the Food and Drug Administration, made the following comment[8] in a sectional analysis of one of the bills which led to the enactment of the present law:

> "The next section, section 19, to my mind is one of the most important sections in the act. It provides for the suppression of repetitious offenses. In the present circumstances there is no way by which that can be done effectively. If an article is misbranded or adulterated, the manufacturer can continue for a protracted period its production and shipment in interstate commerce because of the delay incident to the conclusion of a prosecution. Even though a conviction

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[7]Congressional Record, March 9, 1937, Vol. 81, part 2, pages 2007. See also Dunn, *Federal Food, Drug, and Cosmetic Act—A Statement of its Leglislative Record* (1938), p. 709. Senator Copeland was the "father" of the Federal Food, Drug, and Cosmetic Act.

[8]Hearings before a Subcommittee of the Committee on Commerce, U. S. Senate, 73rd Cong., 2nd Sess., on S. 1944 (Dec. 7 and 8, 1933), page 78. See also Dunn, *Federal Food, Drug, and Cosmetic Act—A Statement of Its Legislative Record* (1938), p. 1102.

were obtained, it would be impossible to bring the matter at issue to a definite determination without the lapse of an inordinate period. This section by expediting action and suppressing continued offenses is for the more adequate protection of the public, and *permits the consideration of the whole question on an equitable basis, because proceedings under it would be instituted in courts of equity.*" [Emphasis added]

In effect, statutes such as those now before this Court [21 U.S.C. 331 and 332(a)], define a type of public nuisance and authorize the district courts to exert their traditional equity powers to abate such nuisance. See 4 Pomeroy, *Equity Jurisprudence* (5th ed. 1941) § 1349, pages 953-955. That there is a statutory basis for the injunction is immaterial. As Pomeroy points out in § 1337 on pages 934-935:

> "In the states adopting the reformed procedure, the codes contain general provisions describing the cases in which an injunction may be issued, *but these provisions do not materially alter the settled equitable jurisdiction,* except in reference to injunctions against actions or judgments at law." [Emphasis added.]

". . . a statutory jurisdiction to grant injunctions is to be administered in the light of general equitable principles." Hart and Wechsler, *The Federal Courts and the Federal System* (University Casebook Series, 1953), p. 1132.

The equity jurisdiction of a federal district court encompasses a tremendous *inherent* power to see that justice is done in any equity case which is properly before the court. That power had its origin in the "system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the

separation of the two countries." *Atlas Life Insurance Co. v. Southern,* 306 U. S. 563, 568 (1939); *Yuba Consolidated Gold Fields* v. *Kilkeary,* 206 F. 2d 884, 887 (C. A. 9, 1953).

The flexibility and scope of equity power have frequently been a subject of comment. In *Brown v. Board of Education of Topeka,* 349 U. S. 294, 299 (1955), the Supreme Court directed the District Courts to supervise "the transition to a system of public education freed of racial discrimination"—one of the most important and complex social problems of our time. On page 300, the Court said:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."

In *Bowen v. Hockley,* 71 F. 2d 781 (C. A. 4, 1934), the Court's ruling effectively illustrated the creative resources of equity. On page 786, the Court said:

> "The fact that the statute does not provide for the protection of those receiving compensation payments and that no decision has dealt with their rights in the absence of statute, is no reason why a court of equity in undertaking the operation of the business should not safeguard their rights. *One of the glories of equity jurisprudence is that it is not bound by the strict rules of the common law, but can mold its decrees to do justice amid all the vicissitudes and intricacies of life.* The principles upon which it proceeds are eternal; but their application in a changing world will necessarily change to meet changed situations. *If relief had been granted only where precedent could be found for it, this great system would never have been de-*

veloped; and, if such a narrow view of equitable powers is adopted now, the result will be the return of the rigid and unyielding system which equity jurisprudence was designed to remedy." [Emphasis added.]

See also, 1 Pomeroy, *Equity Jurisprudence* (5th ed. 1941) §60, page 78; *Hecht Co. v. Bowles,* 321 U. S. 321, 329 (1944).

From earliest times, restitution has been one of the most potent remedies utilized by the Court of Chancery. *Restatement of the Law of Restitution,* pages 4-10. Two of the underlying principles of restitution are declared in the *Restatement* as follows:

"*Section 1. Unjust Enrichment.*

"A person who has been unjustly enriched at the expense of another is required to make restitution to the other."

"*Section 3. Tortious Acquisition of a Benefit.*

"A person is not permitted to profit by his own wrong at the expense of another."

Plainly, under these ancient principles of justice, a person deprived of money through a sale of merchandise induced by fraudulent misrepresentation and made illegal by Act of Congress is seeking no new, unusual, far-reaching or unheard-of relief if he asks that the illegal transaction be set aside and his money restored to him.

In the present case, however, it is not the individual purchaser but the Government, acting on behalf of the public, which seeks restoration of the purchase money to the purchasers. Decisions in a number of significant cases have recognized the principle that issuance of a restitution

order for the benefit of private persons is within the discretion of the District Court in statutory injunction suits brought by the Government. By analogy, we believe the District Court has similar power under the injunction provisions of the Federal Food, Drug, and Cosmetic Act.

Pertinent court cases fall into two principal categories —rent and price control cases, and fair labor standards cases—with anti-trust cases as a related third category.

B. The Rent and Price Control Cases.

The leading case in this discussion and one which we believe is dispositive of the issue in this appeal is *Porter v. Warner Holding Company,* 328 U. S. 395 (1946). There the Price Administrator brought a statutory injunction suit asking that the District Court (1) restrain Warner from continuing to exceed rent ceilings, and (2) order Warner to make restitution of the excessive rents it had already collected. The District Court enjoined Warner from collecting rents in excess of legal maximums but declined to order restitution. The Court of Appeals affirmed, both Courts holding there was no jurisdiction under the statute to order restitution.

In reversing the lower courts, the Supreme Court emphasized the *inherent* powers of the United States District Courts when their equity jurisdiction is invoked. Examining the Emergency Price Control Act, the Supreme Court concluded that such Act had not impaired the traditional equity power of the court to order restitution. Because of the importance of this case here, we quote from it at some length:

Pages 397-398

"Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made

illegal by the Act and to enforce compliance with the Act. *Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.* And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . . Power is thereby resident in the District Court, in exercising this jurisdiction 'to do equity and to mould each decree to the necessities of the particular case.' *Hecht Co. v. Bowles,* 321 U. S. 321, 329. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. *In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances.* Only in that way can equity do complete rather than truncated justice . . ." [Emphasis added.]

Consequently, whenever Congress authorizes resort to the equity jurisdiction of the Courts, it concomitantly sets the stage for the application of any suitable equitable remedy *unless it clearly manifests a contrary intention.* On this point, the Supreme Court further declared:

Page 398.

"Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. *Unless a statute in so many words, or by a necessary*

> *and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.* 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' *Brown v. Swann,* 10 Pet. 407, 503 . . ." [Emphasis added.]

The conclusion drawn from this enunciation of basic equitable principles was inevitable:

> *Pages 398-399.*
>
> "It is readily apparent from the foregoing that a decree compelling one to disgorge profits, rents, or property acquired in violation of the Emergency Price Control Act may properly be entered by a District Court once its equity jurisdiction has been invoked under §205(a). Indeed, the language of §205(a) admits of no other conclusion."

Section 205(a) did not prohibit the issuance of a restitution order; therefore, the District Court could issue such an order in an injunction proceeding under that provision. Moreover, the language of the statute was entirely consistent with the exercise of full equitable powers though it did not use the term "equity." [See 328 U. S. at page 405, footnote 5.] Under section 205(a), the District Court was authorized to grant "a permanent or temporary injunction, restraining order, *or other order.*"

> *Page 399.*
>
> "As recognized in *Hecht Co. v. Bowles* . . . the term 'other order' contemplates a remedy other than that of an injunction or restraining order, *a remedy entered in the exercise of the District Court's equitable jurisdiction.*" [Emphasis added]

Obviously, the term "other order"[9] was tantamount to legislative acquiescence in the use of pre-existing equitable powers which an equity court could use anyway in such a proceeding, absent a statutory prohibition.

Page 400

"The legislative background of §205(a) confirms our conclusion that *the traditional equity powers of a court remain unimpaired* in a proceeding under that section *so that an order of restitution may be made.*" [Emphasis added.]

Speaking of a Senate Report which had stated regarding Section 205(a)—"Such courts are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case"—, the Supreme Court declared.

Page 401

"The last sentence is an unmistakable *acknowledgment* that courts of equity are free to act under

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[9]A later case, *United States v. Moore,* 340 U. S. 616 (1951) held that under the "other order" provision, a District Court could grant restitution in a suit brought by the Government, though there was no right to an injunction because of the termination of rent control. Thus the effect of the statute was to permit the issuance of a restitution order, not only as ancillary to the consideration of an injunction suit but also independently thereof. Speaking of the *Warner* case, *where restitution was ancillary to the injunction suit,* the Court reaffirmed the inherent equitable power to order restitution:

Page 619

"The lower courts allowed the injunction but denied restitution. This Court reversed, concluding that an order of restitution was a proper 'other order.' This interpretation was required to give effect to the congressional purpose to authorize *whatever order within the inherent equitable power of the District Court may be considered appropriate and necessary to enforce compliance with the act.*" [Emphasis added.]

> §205(a) in such a way as to be most responsive to the statutory policy of preventing inflation." [Emphasis added.]

Courts of equity were thus free to act as courts of equity, without legislatively-imposed restriction.

One feature of the Emergency Price Control Act caused a split in the Supreme Court. Section 205(e) authorized an aggrieved purchaser or tenant to sue for damages *on his own behalf*. In the *Warner* case, the statutory period for *such* suit had run. Nevertheless, the majority opinion declared:

> *Page 402, footnote 5*
> ". . . Nowhere, however, was there any indication that §205(e) was intended to whittle down the equitable jurisdiction recognized by §205(a) so as to preclude a suit for restitution."

But the dissenting view was that Congress had created special remedies for recovery of damages by aggrieved individuals, and that such remedies were exclusive and inconsistent with the exercise of inherent equitable jurisdiction to order restitution. Yet, even the minority recognized the validity of the majority's discussion regarding the inherent authority of an equity court:

> *Page 408*
> "This does not imply any restriction upon the creative resources of a court of equity. When Congress is silent in formulating remedies for rights which it has created, courts of equity are free to use these creative resources. But where Congress is explicit in the remedies it affords, . . . even courts of equity may not grant relief in disregard of the remedies specifically defined by Congress."

Two theories were advanced by the majority of the Supreme Court to support the issuance of a restitution order:

Pages 399-400

"An order for the recovery and restitution of illegal rents may be considered a proper 'other order' on either of two theories:

"(1) It may be considered as *an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief* . . .

"(2) It may be considered as *an order appropriate and necessary to enforce compliance with the Act* . . . The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress . . . And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purposes. *Future compliance may be more definitely assured if one is compelled to restore one's illegal gains;* and the statutory policy of preventing inflation is plainly advanced if prices or rents which have been collected in the past are reduced to their legal maximums." [Emphasis added.]

The *Warner* case, we believe, is sound authority for the proposition that the District Court *has* discretionary power to order restitution in a statutory injunction suit under the Federal Food, Drug, and Cosmetic Act unless the Act embodies a legislative mandate to the contrary. In its opinion in the instant case, however, the District Court

chose to disregard the extensive views of the Supreme Court on the inherent equitable powers of a district court when called upon to issue a statutory injunction. The District Court concluded that the *Warner* case was

> "based upon the particular wording of the statute. The other ground was not necessary for the decision. Although considered as dicta, it bears great weight, nevertheless we do not believe that the holding of the Warner case should be so extended." [R. 79.]

While we have the highest respect for the District Court, we believe that the Supreme Court's views on the inherent equitable power of a district court to order restitution in a statutory injunction proceeding are not dicta but constitute the essential holding in the *Warner* case. Hart and Wechsler, *The Federal Courts and The Federal System* (University Casebook Series, 1953), p. 1133, speak of those views as the "main ground" of the decision. The "other order" provision of the statute was simply held to be consistent with, and an affirmation of, the district court's power to use all traditional equitable remedies in such proceedings. Such power exists in an injunction suit, *whether or not there is legislative affirmation, as long as there is no legislative prohibition.*

We are not suggesting that the *Warner* case be extended. We do maintain that it should not be nullified.

Even before the *Warner* case, this Court recognized that the Price Control Act did not disturb "the traditional flexibility of the injunctive process" and did not modify

"the historic power of the Chancellor to do equity." *Porter v. Lux,* 157 F. 2d 756, 757 (C. A. 9, 1946).

Later, this Court had occasion to comment on the holding in the *Warner* case, *Woods v. McCord,* 175 F. 2d 919 (C. A. 9, 1949), and the views there expressed are especially pertinent here. On page 921, this Court said of *Warner:*

> "The Court there held that this section permitted an order restoring to the tenant the amount that he was illegally overcharged. This was on the basis of *either (1) an equitable adjunct to an injunction, i.e., under the inherent equity powers of the court,* or (2) appropriate to enforce compliance with the Act. It is the view of the Supreme Court and our own that *nothing is more clearly a part of equity than 'the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief.' Such is the very essence of justice."* [Emphasis added.]

Clearly, this Court did not consider as a dictum the *Warner* case views on the inherent equity powers of a district court to order restitution. See also *McCoy v. Woods,* 177 F. 2d 354, 355 (C. A. 4, 1949); *Orenstein v. United States,* 191 F. 2d 184, 188-189 (C. A. 1, 1951).

C. The Fair Labor Standards Cases.

The Fair Labor Standards Act and the Federal Food, Drug, and Cosmetic Act were enacted on the same day. [June 25, 1938, 52 Stat. 1040 and 1060.] Both statutes contained provisions for equitable relief that were almost identical.[10]

Several appellate court cases ruled that restitution of back pay could properly be ordered as an adjunct to an injunction under Section 17 of the Fair Labor Standards Act, which required the rehiring of a discharged employee. *McComb v. Frank Scerbo & Sons,* 177 F. 2d 137, 138-139 (C. A. 2, 1949); *Walling v. O'Grady,* 146 F. 2d 422, 423 (C. A. 2, 1949). *Cf. Walling v. Miller,* 138 F. 2d 629 (C. A. 8, 1943), which held that the district court had power to embody a restitution order in a consent decree.

In these cases, as in the *Warner* case, *supra,* one obstacle in the path of restitution was a statutory provision which authorized an aggrieved employee to bring suit in

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[10]Section 302(a) of the Federal Food, Drug, and Cosmetic Act [52 Stat. 1043]:

> "The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown, and subject to the provisions of Section 17 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U. S. C. 1934 ed. title 28, sec. 381), to restrain violations of section 301, except paragraphs (e), (f), (h), (i) and (j)."

Section 17 of the Fair Labor Standards Act [52 Stat. 1069]:

> "The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15."

his own right for back pay plus liquidated damages. [Section 16(b), 52 Stat. 1069.] On this point, the Court stated in the *O'Grady* case:

146 F. 2d at page 423

"The possession by the employee of a right to sue for back pay does not preclude a right of the Administrator. The latter represents not merely the employee but asserts a public interest which is promoted by requiring back pay as well as reinstatement."

In recognition of the practical limitations of an employee's right to sue on his own behalf, the Court observed:

Page 423

"It is probable that the employee could have brought an individual action for loss of wages but such an action would not furnish a remedy adequate for such cases. *The amount involved ordinarily would be small and the expenses of recovery disproportionate* and it seems more in accord with the spirit of sound labor legislation to allow the Administrator to restore all the rights of an employee in a single action instead of requiring one action for injunction and reinstatement by the Administrator and another by the employee for loss of ad interim wages." [Emphasis added.]

In the light of subsequent amendments to the Fair Labor Standards Act, which we shall discuss shortly, it is well to note that two of the Judges in the *Scerbo* case were deeply troubled by the possibility that an employee, who was the beneficiary of a restitution order issued at the instance of the Administrator under Section 17, might thereafter also have brought a suit for back pay and liquidated damages in his own name under Section 16(b). While each Judge wrote a seperate opinion, all three Judges

concurred in the result—namely, that a restitution order could properly be issued in the statutory injunction suit in order to grant full relief.

The *Scerbo* case was decided on August 18, 1949. Two months later, on October 26, 1949, Congress amended the Fair Labor Standards Act. [63 Stat. 910.] By adding subsection (c) to Section 16 [21 U.S.C. 216 (c)] and by revising Section 17 [21 U.S.C. 217], Congress created a special statutory pattern designed (1) *to permit the Administrator to collect back pay on behalf of employees in an independent suit for such purpose,* and (2) to protect employers from double litigation by declaring that the employee's consent to such suit by the Administrator constitutes a waiver of the employee's statutory right to sue in his own behalf. An election is thus forced on the employee, meeting the objections voiced by the concurring Judges in the *Scerbo* case.

A special statutory remedy having been meticulously worked out to achieve restitution for the benefit of aggrieved employees, a restitution order thereafter issued ancillary to an injunction under Section 17 would have been of highly doubtful validity. *Porter v. Warner Holding Co.,* 328 U. S. 395, 398, 401-402 (1946). To leave no uncertainty, Congress changed the injunction provision explicitly to eliminate restitution as a remedy in a suit brought under *that* section:

29 U.S.C. 217

"The district courts . . . shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title: *Provided, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid over-*

time compensation or an additional equal amount as liquidated damages in such action." [Emphasis added.]

If further explanation of the action taken by Congress is needed, it may be found in the Conference Report dated October 17, 1949, identified as H. R. Report Number 1453, 81st Congress, 1st Session. [United States Code Congressional Service, 81st Congress, 1st Session, 1949, Volume 2, pages 2241, 2251-2275.] On page 2273, the Managers on the part of the House reported as follows regarding the change in the injunction provision:

"This proviso has been inserted in Section 17 of the act in view of the provision of the conference agreement contained in section 16(c) of the Act which authorizes the Administrator in certain cases to bring suits for damages for unpaid minimum wages and overtime compensation owing to employees at the written request of such employees. *Under the conference agreement the proviso does not preclude the Administrator from joining in a single complaint causes of action arising under section 16(c) and section 17.* Nor is it intended that if the Administrator brings an action under section 16(c) he is thereby precluded from bringing an action under section 17 to restrain violations of the act. Similarly, the bringing of an injunction action under section 17 will not preclude the Administrator from also bringing in an appropriate case an action under section 16(c) . . . *The provision, however, will have the effect of reversing such decisions as McComb v. Scerbo* ((C. A. 2) 17 Labor Cases No. 65, 297), *in which the court included a restitution order in an injunction decree granted under section 17."* [Emphasis added.]

Restitution was thereby removed from the realm of equitable discretion and given status as an action at law where

judgment for back pay is mandatory if a proper showing is made.

After considering the judicial and legislative developments under the Fair Labor Standards Act, the lower court in the present case concluded that such developments support the view that restitution is not a proper remedy under the Federal Food, Drug, and Cosmetic Act:

> "This blunt repudiation by Congress of the asserted powers of a district court to order restitution under Fair Labor Standards Act, with its almost identical provision to that of Sec. 302(a) of the Food and Drug Act [Sec. 332(a) U.S.C.A. Title 21], is significant and convincing as far as this court is concerned." [R. 80-81.]

Had Congress simply amended Section 17 of the Fair Labor Standards Act to prohibit restitution in an injunction suit, such legislation might perhaps have been deemed a "blunt repudiation." But Congress went further and amended Sections 16 and 17 in such a way as not to reject the principle of restitution but rather, with some qualifications, to embrace it and make it an instrument of national policy. This, we believe, is not a repudiation.

The principal thought emerging from these considerations is that in injunction proceedings under a statute practically identical with the injunction provision in the Federal Food, Drug, and Cosmetic Act, restitution was uniformly deemed a proper remedy within the discretion of the District Court, until Congress chose to eliminate that remedy and substitute another. That Congress eventually decided upon such a course of action did not establish that the courts were in error when, theretofore, they ordered restitution. For, as the Supreme Court pointed out, the power to order restitution in an equity proceeding exists in the

district court unless and until clearly curtailed by statute. *Porter v. Warner Holding Co.,* 328 U. S. 395, 398-400 (1946).

D. The Anti-Trust Cases

Injunction suits to restrain violations of the Sherman Act have not dealt with the question of restitution but have long sustained the analogous remedy of divestiture. An equity court, enjoining a conspiracy in restraint of trade under 15 U.S.C. 4, has the *inherent* discretionary power, without benefit of an express statute, to order defendants to divest themselves of property which comprises the fruit of their illegal practices.

In *Schine Chain Theatres, Inc. v. United States,* 334 U. S. 110 (1948), the Supreme Court declared divestiture to be an equitable remedy, likening it to restitution, and approving its discretionary use to overcome the advantage which accrues to the defendant for the practical reason that he always has a headstart over the Government in his unconscionable marathon. On page 128, the Court said:

> "In this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest . . . They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors. Such a course would make enforcement of the Act a futile thing unless perchance the United States moved in at the incipient stages of the unlawful project . . .
>
> "To require divestiture of theatres unlawfully acquired is not to add to the penalties that Congress has provided in the antitrust laws. *Like restitution* it merely deprives a defendant of the gains from his

> wrongful conduct. *It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project.*" [Emphasis added.]

Again approving the remedy of divestiture, the Court said in *United States v. Paramount Pictures,* 334 U. S. 131 (1948) at page 171:

> "Otherwise, there would be reward from the conspiracy through retention of its fruits. Hence the problem of the District Court does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy. Its function includes undoing what the conspiracy achieved. As we have discussed in *Schine Chain Theatres, Inc. v. United States ante,* p. 110, the requirement that the defendants restore what they unlawfully obtained is no more punishment than the familiar remedy of restitution."

Here, therefore, is recognition once more of the "creative resources" of a court of equity. It is not limited to the empty gesture of halting an activity which has already achieved its forbidden objective. If justice will best be subserved by such action, the equity court may go further and set the violater back to where he would have been had he not ventured out of bounds.

In the present case, the lower court stated as one reason for its decision that "restitution, apart from its equitable considerations, may also be considered punitive." [R. 82.] But the above quotations from both the *Schine* and the *Paramount Pictures* cases show that the Supreme Court's express view is *contra.*

E. Restitution as a Remedy Under the Injunction Provisions of the Federal Food, Drug, and Cosmetic Act.

In *Porter v. Warner Holding Co.,* 328 U. S. 395, 398 (1946), the Supreme Court declared that when a Court's equity jurisdiction is invoked, all of its inherent equitable powers are available for the proper and complete exercise of that jurisdiction, "unless otherwise provided by statute." Stated in terms of the present case, restitution is available if the statute does not affirmatively bar it.

The injunction provisions of the Federal Food, Drug, and Cosmetic Act contain two subsections:

> *"21 U.S.C. 332. Injunction proceedings.*
>
> "(a) *Jurisdiction of courts*
>
> "The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown, and subject to the provisions of section 381 (relating to notice to opposite party) of Title 28, to restrain violations of section 331 of this title, except paragraphs (e), (f), and (h)-(j) of said section.
>
> "(b) *Violation of Injunction*
>
> *"In case of violation of an injunction or* restraining order issued under this section, *which also constitutes a violation of this chapter,* trial shall be by the court, or, upon demand of the accused, by a jury. Such trial shall be conducted in accordance with the practice and procedure applicable in the case of proceedings subject to the provisions of section 387 of Title 28." [Emphasis added.]

This section does not prohibit the use of restitution. Moreover, as we shall demonstrate shortly, it contemplates that an injunction order issued under this section may do more

than simply "restrain violations of section 331." The statute does not include an express "other order" provision such as appeared in the Emergency Price Control Act discussed in the *Warner* case, *supra*. Yet, when the statute is read as a whole, there is clear legislative acknowledgment of the inherent authority to issue "other orders" within the equitable discretion of a court.

All enforcement actions under the Federal Food, Drug, and Cosmetic Act, including injunction suits, are brought by and in the name of the United States. [21 U.S.C. 337.] Where a decree is entered in an injunction suit brought in the name of the United States, there is no right to a jury trial in a criminal contempt action for violation of the injunction unless such right is expressly conferred by statute. [18 U.S.C. 3691; Criminal Rule 42(b); see also *United States v. United Mine Workers of America,* 330 U. S. 258, 298 (1947).] But in 21 U.S.C. 332(b), Congress provided a *limited* right to a jury trial for violation of an injunction issued under the Federal Food, Drug, and Cosmetic Act.

Thus, where the alleged violation *"also constitutes a violation of this chapter"* (the Federal Food, Drug, and Cosmetic Act), defendant is entitled to a jury trial on demand. By the same token, the alleged violation may under some circumstances *not* constitute a violation of the Act, in which case the defendant would not be entitled to a jury trial.

Provisions in an injunction decree issued under 21 U.S.C. 332(a) may restrain the doing of certain prohibited acts enumerated in 21 U.S.C. 331—for example, the introduction of a misbranded drug into interstate commerce. Violation of such provision in the decree would also constitute a violation of the Act. However, as in any other

equity case, provisions in the injunction decree may also command or enjoin the doing of other acts to assure compliance with the law, or to implement and make effective the Court's restraint of violations, or in any other way to accomplish justice in the particular case. Violations of such ancillary provisions in the injunction decree would not entitle a defendant to a jury trial under 21 U.S.C. 332(b), since those violations would not be violations of the Act.

An example of the discretion of an equity court to adopt remedies not specified in a statute in order to facilitate enforcement of a statutory injunction appears in *United States v. Bausch & Lomb Co.*, 321 U. S. 707 (1944). That was a suit to restrain violations of the Sherman Act. The District Court issued an injunction, and included provisions which permitted representatives of the Department of Justice to have access to all records and documents of one of the defendants relating to any of the matters contained in the judgment, as well as to require written reports thereon. While the statute made no provision for such broad visitatorial powers, the Supreme Court sustained this action of the lower court, stating at page 726:

> "If reasonably necessary to wipe out the illegal distribution system, we see no constitutional objection to the employment by equity of this method. In the immediately preceding paragraphs . . ., we cited important precedents of this court which uphold equity's authority to use quite drastic measures to achieve freedom from the influence of the unlawful restraint of trade. These precedents are applicable here. The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions. Doubts are to 'be resolved in favor of the Government and against the conspirators.' "

The principle is well established that a court of equity under a statute enacted to protect an important public interest need not limit its decree to prohibitions, but is "bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival." *Ethyl Gasoline Corp. v. United States,* 309 U. S. 436, 461 (1940); *United States v. Crescent Amusement Co.,* 323 U. S. 173, 189 (1944). The test is the effectuation of the statutory policy and the vindication of public rights. *United States v. Sheff,* 194 F. 2d 596, 597 (C. A. 9, 1952); *Creedon v. Randolph,* 165 F. 2d 918, 919 (C. A. 5, 1948).

Under the Federal Food, Drug, and Cosmetic Act, affirmative and mandatory provisions are commonly included in injunction decrees to facilitate enforcement or otherwise achieve the objective of the law, though not expressly authorized by statute. In this very case, Part III of the "Final Consent Judgment as to Permanent Injunction Only" requires the defendants to call the Judgment to the attention of any agent who assist in marketing the drugs in question, to obtain a written statement from such agent, to maintain a file of those statements, and to permit Government representatives to examine them. [R. 68.] Part V of the Judgment declares that only a violation of Part II shall constitute a violation of the Federal Food, Drug, and Cosmetic Act within the meaning of the contempt provisions, 21 U.S.C. 332(b). [R. 69.] Consequently, defendants would have a right to demand a jury trial for violation of the *prohibitory provisions in Part II* but would not have a right to a jury trial for violation of the *mandatory provisions in Part III.*

In another food and drug injunction suit, defendants were not only restrained from shipping adulterated cheese

in interstate commerce but were also required to take certain affirmative steps to operate under sanitary conditions, such as to make specific repairs and improvements inside the plant, and to clean up a marsh in the vicinity of the sewer plant to make it ineffective as a breeding place for flies. *United States v. Nelson Creamery Corp.* (N.D.N.Y., 1946), reported in Food Notice of Judgment No. 17522.[11]

Thus the stautory design is plain in the light of its judicial application. Under Section 332(a), the equity court is expressly authorized to restrain the doing of certain prohibited acts. As an equity court, it may also restrain or compel the doing of any other act reasonably designed to carry out the purpose of the law.

An injunction which restrains further interstate shipments of a misbranded drug is of little benefit to purchasers who bought the drug prior to the issuance of the injunction in reliance upon the promoter's fraudulent misrepresentations. As to such purchasers, the salutary ends of the law are completely defeated unless their status quo is restored by a refund of the purchase price. Restitution is an eminently suitable remedy to bring about this restoration.

Obviously, activities such as those complained of by the Government in the present case result in the mulcting of relatively small sums from large numbers of persons who, as a practical matter, have no recourse against the defendants on their own initiative. Confronted with this situation of a frustrated public interest on the one hand, and unjust enrichment on the other, a court of equity is not helpless to right the wrong. "Courts of equity may, and

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[11]See footnote 1.

frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Railway Co. v. System Federation No. 40,* 300 U. S. 515, 552 (1937).

It is settled that the Federal Food, Drug, and Cosmetic Act should be construed so as best to effectuate its principal objective—broad protection of the public from adulterated or misbranded foods, drugs, devices, and cosmetics. In *Pasadena Research Laboratories v. United States,* 169 F. 2d 375 (C. A. 9, 1948), cert. den. 335 U. S. 853, the Court declared on page 379:

> "The Act is remedial, and should be liberally construed so as to carry out its beneficent purposes.
>
> "In *United States v. Dotterweich,* 320 U. S. 277, 280, 64 S.Ct. 134, 136, 88 L. Ed. 48, the Court said of this statute:
>
> " 'The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words. [Cases cited.']
>
> ". . . We have recently had occasion to construe this same statute and have endeavored to do so in the liberal spirit commanded by the Supreme Court. *Research Laboratories, Inc. v. United States,* 9 Cir., 167 F. 2d 410, 421. In the instant case, we do not feel disposed to depart from that same generous norm of interpretation, which we believe accords with public policy and with the spirit of the law itself."

In *United States v. Antikamnia Chemical Co.,* 231 U. S. 654, 657 (1914), a case arising under the Food and Drugs Act of 1906, which preceded the instant legislation, the Supreme Court observed:

> *"The purpose of the law is the ever insistent consideration in its interpretation."* [Emphasis added.]

In *United States v. El-O-Pathic Pharmacy et. al.,* 192 F. 2d 62 (C. A. 9, 1951), this Court said at page 75:

> ". . . its purpose is to protect the public, the vast multitude which includes the ignorant, the unthinking, and the credulous who, when making a purchase, do not stop to analyze."

And in another food and drug case, *Kordel v. United States,* 335 U. S. 345, 349 (1948), the Court spoke of

> "the high purpose of the Act to protect consumers who under present conditions are largely unable to protect themselves in this field."

The lower court here felt that " 'the Federal Food, Drug, and Cosmetic Act is not concerned with the payment of money. Its purpose, or as much of it as is relevant here, is to prevent misbranding; that purpose can be accomplished by a restraining order.' " [R. 82.] But protection of the "public pocketbook" is as much an aim of the statute as protection of the "public health." See *United States v. 7 Jugs . . . Dr. Salsbury's Rakos, etc.,* 53 F. Supp. 746, 752 (D.Minn., 1946), and cases cited therein. This is reflected in the Act's legislative history. Thus in the final Conference Report, H. Rep. No. 2716, 75th Cong., 3d Sess., (June 11, 1938), page 22, the Committee said of this law that it was designed for the purpose of

> "safeguarding the public health, preventing deceit upon the purchasing public, and for other purposes . . ."

In H. Rep. No. 2139, 75th Cong., 3d Sess. (April 14, 1938), p. 2, the Committe on Interstate and Foreign Commerce said:

> "The measure contains substantially all the features of the old law that have proved valuable in promoting honesty and fair dealing. But it amplifies and strengthens the provisions designed to safeguard the public health and prevent deception. . . ."

And in H. Rep. No. 2755, 74th Cong., 2d Sess. (May 22, 1936), pages 2 and 3, the Committee on Interstate and Foreign Commerce said:

> "While the old law has been of incalculable benefit to American consumers, it contains serious loopholes and is not sufficiently broad in its scope to meet the requirements of consumer protection under modern conditions. In considering the measure the committee had before it *a host of exhibits and examples of abuses of the consumer's health and pocketbook,* against which there is now no effective restriction or no restriction at all. Among these were the following:
>
> Worthless drugs sold for serious diseases . . .
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> * * * * * * * *
>
> Debased and cheapened foods . . .
>
> Deceptive advertising of food, drugs, therapeutic devices, and cosmetics resulting in innumerable abuses of consumer welfare . . .
>
> * * * * * * * *
>
> It (the proposed bill) merely sets up checks against the small but unscrupulous minority who have not chosen to observe the underlying principles of the old Wiley law and have taken advantage of its limitations *to mulct the public* and embarrass honest competitors." (Emphasis added.)

Manifestly, the law's concern is to safeguard the consumer from pecuniary loss as well as from bodily harm. The law, we submit, does not have as its sole objective the abstract concept—"to prevent misbranding." [R. 82.] "The problem is a practical one of consumer protection, not dialectics." *United States v. Urbuteit,* 335 U. S. 355, 358 (1948).

We believe that the salutary aims of this law could hardly be more effectively furthered than by a judicial recognition that there is lodged in the District Court discretionary power to compel restitution in a proper case under 21 U.S.C. 332(a). Such a pronouncement would give pause to the predatory entrepeneur who contemplates a get-rich-quick scheme of relieving thousands of our citizens of relatively small individual sums of money through fraudulent promises as to the great curative or restorative power of his nostrum. It would also take cognizance of the Government's authority to seek vindication of private rights which at present are beyond self-protection because of the relatively small claims involved, and the distance between the persons who have been defrauded and the one responsible for the fraud.

Moreover, the Federal Food, Drug, and Cosmetic Act contains (1) no prohibition against restitution, (2) a recognition that the District Court may include provisions in an injunction decree other than the restraint of a prohibited act, and (3) no exclusive statutory procedure for return of the purchase price to defrauded customers. Consequently, "the traditional equity powers of a court remain

unimpaired . . . so that an order of restitution may be made." *Porter v. Warner Holding Co.*, 328 U. S. 395, 400.[12]

From an enforcement standpoint, the present case illustrates a familiar type of fraudulent promotion of drugs. Characteristically, the following elements are present:

(a) An intensified advertising campaign conducted for a relatively short period of time and focussed upon a selected and vulnerable segment of the population.

(b) An inexpensive and ineffective product.

(c) A high selling price.

(d) Dishonest and extravagant misrepresentations regarding the product.

Because the promotion is based on dishonesty and misrepresentation, the promoter cannot ordinarily expect a con-

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[12]A number of law review articles have considered the question of restitution under the Federal Food, Drug, and Cosmetic, with varying conclusions.

Articles supporting the restitution theory:

Note, 4 Stan. L. Rev. 519-536 (1952).

Goodrich, *Modern Application of an Ancient Remedy,* 9 Food Drug Cosmetic L. J. 565-572 (1954).

Levine, *Restitution—A New Enforcement Sanction,* 6 Food Drug Cosmetic L. J. 503-514 (1951).

Articles opposed to the restitution theory:

Noland, *Section 302(a) of the Federal Food, Drug, and Cosmetic Act: Restitution Re-examined,* 7 Food Drug Cosmetic L. J. 373-400 (1952).

Rhyne, *Penalty Through Publicity: FDA's Restitution Gambit,* 7 Food Drug Cosmetic L. J. 666-680 (1952).

Williams, *If This Be Equity,* 10 Food Drug Cosmetic L. J. 92-103 (1955).

See also:

Developments in the Law—The Federal Food, Drug, and Cosmetic Act, 67 Harv. L. Rev. 632, 718-720 (1954).

tinuing income to be derived from re-orders of the product. Unless the promotion can be expanded to attract new customers, the promoter must intensify his efforts to achieve the maximum sales volume within a short period of time. As returns diminish, he turns his attention to a new scheme.

The profit incentive is so great that it minimizes the deterring effect of the express statutory remedies. A person about to engage upon a promotion of this kind takes a calculated risk. What, in his judgment, are the hazards which might serve to deter him? Seizure action [under 21 U.S.C. 334(a)] against the offending goods will usually not result because interstate shipments are widely dispersed and are made in a large number of small quantities. Criminal action [under 21 U.S.C. 333] may result in a fine and jail sentence, but the fine however substanial is but a license fee compared to the profits, and the jail sentence—if one is imposed—is usually suspended in cases of this kind. Injunction action [under 21 U.S.C. 332(a)] requires such extensive investigational and preparatory work that a promotion may well have run its cycle by the time a Complaint and supporting affidavits are filed. Even in this case, where the Government was able to act with unusual rapidity, about a month elapsed between the inception of the "Adler's Compound" promotion and the issuance of a Temporary Restraining Order. During that time, a substantial number of mailings of the product took place at a price of $10 to $35 per mailing. [R. 19-20.]

Against this type of violation, restitution would serve as a powerful deterrent because it would remove the probability of retaining the profits. We submit that the full remedial resources of our system of jurisprudence should be utilized to eradicate evils such as the one in question.

VII.
CONCLUSION.

The District Court has the discretionary power to order restitution in this case. The lower Court's decision should be reversed and the case remanded with instructions that the court below exercise its discretion and determine whether it should order restitution and, if so, upon what terms.

Respectfully submitted,

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